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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. DELMAR PALOMO, Defendant and Appellant.	A121858 (Super. Ct. for the City & County of San Francisco No. 202857)

Defendant Delmar Palomo appeals his convictions for simple stalking (Pen. Code, § 646.9, subd. (a)),[1] and stalking in violation of a restraining order (§ 646.9, subd. (b)). He contends that he cannot properly be convicted of both offenses under *People v. Muhammad* (2007) 157 Cal.App.4th 484. He also claims the evidence presented at trial was insufficient to sustain his conviction for stalking in violation of a restraining order, and that the trial court erred in admitting the complaining witness's prior consistent statements. We conclude that the simple stalking conviction must be vacated. In all other respects, we affirm the judgment.

FACTUAL BACKGROUND

Defendant and the victim, Eva Lopez, met in 2004 when they were both working at the same hotel in San Francisco. They became friends and defendant moved in with her in February 2005. Lopez testified that they were never boyfriend and girlfriend, but they did have sexual relations after they began living together. She also testified that

[1] All subsequent statutory references are to the Penal Code except as otherwise indicated.

during 2005, defendant had attempted to force her to have sex and, on another occasion, had hit her in the face when he was drunk after she refused to have sex with him.[2] Another time, they argued and she took defendant's keys and kicked him out of the apartment. A few days later, he broke into the apartment while she was out.

In December 2006, Lopez traveled with defendant to Oregon to visit some of his family members. During the visit, his niece told her that he was married to the mother of his daughter, and that he had hit his previous girlfriends. The niece testified, however, that she never told Lopez that defendant's ex-girlfriends had said he was violent towards them. When they returned to San Francisco, Lopez called a telephone number in Mexico that defendant had previously used to call his family. She spoke with his wife. He had previously told Lopez he had a child in Mexico, but he never told her that he was married. When she next saw him, she told him to move out. She decided that she would never allow him to come back.

On January 5, 2007, Lopez was leaving for work when she saw defendant waiting for her by the door of her apartment building. She did not want to let him in, and they argued on the sidewalk for about two hours. He was insisting that he wanted another chance to be with her. Eventually, she decided to go back to her apartment, and defendant came in behind her even though she had not invited him. Once in the apartment, he pushed her onto the bed and tried to have sex with her. She testified that they struggled for about an hour. He eventually left when she started crying.

On January 9, 2007, defendant returned to Lopez's apartment, saying that he wanted to make copies using the printer inside. She was reluctant to let him in, but he promised he would leave as soon as he was finished. When they went inside the apartment, he tried to kiss her and repeated that he wanted another chance. She asked him to leave when he finished his copying, which he did.

The next day, defendant came to the apartment. When she opened the door, he pushed her onto the bed and struggled with her while removing her clothing. He

[2] Defendant testified that he hit her accidentally as he was falling off the bed.

eventually penetrated her with his penis, but at one point he got distracted and she was able to push him off of her.[3] He left when she asked him to. She did not call the police.

The following day, January 11, 2007, defendant came to Lopez's apartment and knocked loudly on the door. She was inside with her sister-in-law. She eventually opened the door because she was afraid he would break it down. He came inside and grabbed her, asking why she wouldn't open the door for him as they had spent the previous night together. Less than five minutes later, they all went outside and she went with her sister-in-law to pick up her brother from work and go out for dinner. Defendant followed the two women for about a block and a half. After dinner, her brother and sister-in-law visited with her in her apartment until after midnight.

Lopez testified that after her relatives left, defendant jumped out of the closet. He told her he had opened her front door using a wire. He tried to kiss her, take off her clothes, and throw her on the bed. She told him "no" and threatened to call the police. He replied that if she sent him to jail he would come back and attack her and her brother. They struggled on the bed and defendant put a T-shirt in her mouth to stop her from screaming. He left quickly when they heard someone coming down the stairs. As soon as he left, she called 911.

Over the next several days, defendant left multiple messages on Lopez's answering machine, apologizing for what had happened that night. He also left a message stating: "You know I can get into your house any time I want. I need to talk to you. This is serious. I'm not playing around."

On January 16, 2007, Lopez went to the police station to obtain advice on how to secure a restraining order. The following day, she met with an officer who recorded defendant's voicemail messages to her. Defendant was served with an emergency protective order on January 17, 2007. The officer who served the order explained to him that he was required to stay away and not make any contact with Lopez.

[3] Defendant testified that the sex was consensual.

The hearing on the restraining order was held on February 7, 2007. Defendant was present at the hearing. The trial court issued a restraining order. At trial, defendant admitted to contacting Lopez several times, even after he was served with the restraining order.

On February 11, 2007, Lopez encountered defendant while she was walking to her apartment. He ran after her and told her that he wanted to talk. She told him that she had nothing to talk to him about and that he should respect the restraining order. When he would not stop talking to her, she told him she was going to call the police and pulled out her cell phone. He took the phone away from her and ran ahead, laughing at her.[4] She walked after him and sprayed him with her pepper spray. He took the spray from her, sprayed her with it, and tried to force her to open the door so that he could go inside and wash his face. Two men came over and confronted him. He ran away with the cell phone. The next day, she saw defendant loitering near her residence. She went back into her apartment because she was afraid to go out. A few days later, she got the cell phone back after he gave it to one of her coworkers.

From February 7, 2007, through the month of March, Lopez received several telephone calls and text messages from defendant. She did not answer any of his calls, and he left several messages on her voice mail.[5] At trial, a transcript of the voice messages left by defendant from February 12 to February 28 was admitted into evidence. In one of the messages, he says that he loves Lopez and has brought a present to her house. He also states that he is no longer in San Francisco and is not going to bother her any more. The content of the text messages is similar. For example, on March 2, 2007, he texted: "Eva, answer my phone calls. Don't ignore me. You were a—a beautiful couple. You were a good wife. I love you. Take care." Lopez testified that the text and voicemail messages caused her to feel harassed.

[4] At trial, defendant admitted he took the cell phone away from Lopez because he wanted to prevent her from calling 911.

[5] Defendant testified that Lopez also called him during this time.

PROCEDURAL HISTORY

On April 2, 2008, an amended information was filed charging defendant with two counts of residential burglary (§ 459; counts 1 & 5), one count of rape (§ 261, subd. (a)(2); count 2), two counts of assault with intent to commit rape during the commission of burglary (§ 220, subd. (b); counts 3 & 7), two counts of assault with intent to commit rape (§ 220, subd. (a); counts 4 & 8), one count of attempted rape (§§ 261, subd. (a)(2)/664; count 6), one count of simple stalking (§ 646.9, subd. (a); count 9), one count of stalking in violation of a restraining order (§ 646.9, subd. (b); count 10), three counts of misdemeanor battery (§ 242; counts 11, 12, & 13), one count of misdemeanor dissuading a witness (§ 136.1, subd. (a)(1); count 14),[6] and 20 counts of misdemeanor disobeying a domestic relations court order (§ 273.6, subd. (a); counts 15 through 34). The information also alleged in connection with counts 2 and 6 that defendant committed the offenses during the course of a burglary (§ 667.61, subd. (d)(4)).

On April 28, 2008, the trial court dismissed counts 11, 12, and 13 pursuant to section 1385.

On April 30, 2008, a jury convicted defendant on counts 9, 10, 14 through 29, and 31 through 34, and of misdemeanor assault (§ 240) as a lesser included offense of count 8. The jury acquitted him of the remaining charges

On May 30, 2008, the trial court sentenced defendant to the three-year midterm on count 10, and stayed the sentence on the remaining counts pursuant to section 654. This appeal followed.

DISCUSSION

I. Whether Defendant Can Properly be Convicted of Both Stalking Counts

Section 646.9 provides, in relevant part:

"(a) Any person who willfully, maliciously, and repeatedly follows or willfully and maliciously harasses another person and who makes a credible threat with the intent to place that person in reasonable fear for his or her safety, or the safety of his or her

[6] This count was amended on April 30, 2008, to allege a violation of section 136.1, subdivision (b)(1).

immediate family is guilty of the crime of stalking, punishable by imprisonment in a county jail for not more than one year, or by a fine of not more than one thousand dollars ($ 1,000), or by both that fine and imprisonment, or by imprisonment in the state prison.

"(b) Any person who violates subdivision (a) when there is a temporary restraining order, injunction, or any other court order in effect prohibiting the behavior described in subdivision (a) against the same party, shall be punished by imprisonment in the state prison for two, three, or four years. [¶] . . . [¶]

"(e) For the purposes of this section, 'harasses' means engages in a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, torments, or terrorizes the person, and that serves no legitimate purpose.

"(f) For the purposes of this section, 'course of conduct' means two or more acts occurring over a period of time, however short, evidencing a continuity of purpose. . . ."

The elements of stalking can be summarized as: (1) repeatedly following or harassing another person, and (2) making a credible threat (3) with the intent to place that person in reasonable fear for his or her safety or the safety of his or her immediate family. (§ 646.9, subd. (a); see *People v. Zavala* (2005) 130 Cal.App.4th 758, 766–767 (*Zavala*).) Subdivision (b) of section 646.9 is a penalty provision, which is triggered when the offense of stalking defined by subdivision (a) is committed by a person while he is subject to a protective order prohibiting him from stalking the same victim. (*People v. Muhammad* (2007) 157 Cal.App.4th 484, 494 (*Muhammad*).) As noted in *People v. McClelland* (1996) 42 Cal.App.4th 144, 152, section 646.9, subdivision (b), serves the legislative purpose of providing "enhanced punishment to those stalkers who have been ordered to refrain from such conduct in civil proceedings, and, hence, have been warned that their behavior is unacceptable."

The trial court apparently interpreted the conviction for 646.9, subdivision (b), as an enhancement for a conviction for 646.9, subdivision (a). At sentencing, the court stated: "And the People are aware that the defendant was convicted of another felony, that being 646.9(a), which also carries as a state prison sentence of 16, two or three years. But under the current case law, specifically related to stalking and also pursuant to 654,

the defendant cannot be sentenced on both the (a) count and the (b) count, as the (b) count is an enhancement. . . . And that's the violation of 646.9(a) when there has been a stay-away order imposed, as was the case here from February 11, 2007, to March 7, 2007." The court entered convictions for violations of both subdivision (a) and subdivision (b) of section 646.9, however, punishment for the subdivision (a) conviction was stayed pursuant to section 654.

Relying on *Muhammad, supra*, 157 Cal.App.4th 484, defendant contends he cannot properly be convicted of both stalking (§ 646.9, subd. (a)) and stalking in violation of a restraining order (§ 646.9, subd. (b)) because the latter charge "is not a separate substantive offense, but merely provides a greater penalty for stalking if certain facts are established." His argument has merit.

The issue in *Muhammad, supra*, centered on "whether subdivisions (a), (b), and (c)(1) and (2) of section 646.9 define separate substantive offenses, each with its own distinct elements."[7] (*Muhammad, supra*, 157 Cal.App.4th 484, 490.) The court concluded that the different subdivisions "do *not* create separate offenses . . . ." (*Id*. at p. 492, italics added.) The court also concluded that "subdivisions (b), and (c)(1) and (2) of section 646.9 are not sentencing enhancements." (*Ibid*.) Instead, "The effect of subdivisions (b) and (c) is to establish a higher base term for stalking when it is committed by a defendant with a particular criminal history." (*Id*. at p. 494.) The court thus concluded: "subdivisions (b), and (c)(1) and (2) of section 646.9 are penalty provisions triggered when the offense of stalking as defined in subdivision (a) of that section is committed by a person with a specified history of misconduct." (*Ibid*.)

The People do not argue that *Muhammad* was wrongly decided. Instead they contend the two convictions are proper because the two counts cover different, albeit overlapping, time periods. Specifically, count 9 covers conduct from January 5, 2007, through March 7, 2007, whereas count 10 covers February 11, 2007, through March 7, 2007.

[7] Section 646.9, subdivision (c)(1) and (2) addresses when a defendant has prior convictions for making terrorist threats or for felony stalking.

We observe stalking requires multiple acts and is "self-defined to require a course of conduct." (*Zavala, supra*, 130 Cal.App.4th 758, 769.) "Absent express legislative direction to the contrary, where the commission of a crime involves continuous conduct which may range over a substantial length of time and defendant conducts himself in such a fashion with but a single intent and objective, that defendant can be convicted of only a single offense. For example, a defendant can be convicted only once for failing to provide for a child pursuant to section 270 even though no support may have been provided for several continuous months. [Citations.] Similarly, '[v]iolations of certain other offenses frequently involve repetitive or continuous conduct. [Citations.]' [Citations.] Consequently, under such circumstances where a defendant acts in a constant fashion but with a single intent and objective in mind, that defendant can only be convicted of a single offense." (*People v. Djekich* (1991) 229 Cal.App.3d 1213, 1221.)

As we understand the People's argument, the elements of the simple stalking charge in count 9 were satisfied by conduct that occurred between January 5, 2007 and February 10, 2007, the period of time that is not also covered by count 10. The problem with this argument is that count 9 as charged was not limited to conduct that occurred during this time period.[8] Because the jury was not asked to make a finding beyond a reasonable doubt as to whether defendant committed the crime of stalking between January 5, 2007, and February 10, 2007, we are unable to conclude his conviction for violation of section 646.9, subdivision (a), can be deemed a separate and distinct crime. In accordance with *Muhammad*, we agree with defendant that subdivisions (a) and (b) of section 646.9 do not create separate criminal offenses. Accordingly, as the same conduct forms the basis of the two charges, defendant cannot be convicted of having violated both subdivisions.

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[8] The count as charged reads: "That said defendant, DELMAR PALOMO, did in the City and County of San Francisco, State of California, between the 5th day of January, 2007 through the 7th day of March, 2007, both days inclusive, commit the crime of STALKING, to wit: Violating Section 646.9(a) of the Penal Code, a Felony, in that the said defendant did willfully, maliciously and repeatedly follow and willfully and maliciously harasses [*sic*] another, and made a credible threat against EVA LOPEZ with the intent to place her in reasonable fear of her safety and the safety of her family."

Defendant asks us to strike count 10, and not count 9, arguing there is insufficient evidence that he made a credible threat against Lopez after the restraining order was issued. In reviewing a contention that there was insufficient evidence to support the conviction for stalking in violation of a restraining order, "[O]ur role on appeal is a limited one. 'The proper test for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.] [¶] Although we must ensure the evidence is reasonable, credible, and of solid value, nonetheless it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. [Citation.] Thus, if the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder. [Citations.]' [Citation.]" (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) "The question, of course, is not whether there is evidence from which the jury could have reached some other conclusion, but whether, viewing the evidence in the light most favorable to respondent, and presuming in support of the judgment the existence of every fact the trier reasonably could deduce from the evidence, there is substantial evidence of appellant's guilt—i.e., evidence that is credible and of solid value—from which a rational trier of fact could have found the defendant guilty beyond a reasonable doubt." (*People v. Falck* (1997) 52 Cal.App.4th 287, 297.)

Section 646.9, subdivision (g), provides, in part: "For the purposes of this section, 'credible threat' means a verbal or written threat, including that performed through the use of an electronic communication device, *or a threat implied by a pattern of conduct or a combination of verbal, written, or electronically communicated statements and conduct,* made with the intent to place the person that is the target of the threat in reasonable fear for his or her safety or the safety of his or her family, and made with the apparent ability to carry out the threat so as to cause the person who is the target of the

threat to reasonably fear for his or her safety or the safety of his or her family. It is not necessary to prove that the defendant had the intent to actually carry out the threat."

Taken as a whole, there was sufficient evidence to support the jury's finding that defendant made a credible threat during the relevant time period. On February 11, 2007, the initial date stated in the stalking charge in count 10, he approached Lopez at her residence, insisted that he wanted to resume their relationship, grabbed her cell phone when she threatened to call 911, and caused her to be sprayed with pepper spray. He engaged in this conduct while knowing the restraining order was in effect. Subsequently, he contacted her by telephone several times over the course of approximately three weeks and left multiple voicemail and text messages professing his love for her. This pattern of conduct, including confronting her at her residence, depriving her of the ability to call 911, contacting her personal telephones and leaving messages when it was clear that the contact was unwelcome, implied he was going to do whatever it took to resume their relationship, reasonably causing her to fear for her safety. We conclude substantial evidence supports the conviction on count 10.

II. Denial of Section 995 Motion

Defendant claims the trial court erred in denying his motion to set aside count 10 of the information pursuant to section 995, because the evidence presented at the preliminary hearing was insufficient to establish he made any threats to Lopez. We disagree.

At the preliminary hearing, Lopez testified regarding the February incident involving the cell phone and the pepper spray. As we have already concluded, this incident was sufficient to support a finding that defendant gave her reasonable cause to fear for her own safety.

Even if we were to agree with defendant that the trial court erroneously denied his section 995 motion, reversal of his conviction is not required. "[A]n erroneous denial of a section 995 motion justifies reversal of a judgment of conviction only when a defendant is able to demonstrate *prejudice at trial* flowing from the purportedly inadequate evidentiary showing at the preliminary [examination]." (*People v. Crittenden* (1994) 9

Cal.4th 83, 136–137, italics added; see also *People v. Pompa-Ortiz* (1980) 27 Cal.3d 519.) "Where the evidence produced at trial amply supports the jury's finding, any question whether the evidence produced at the preliminary hearing supported the finding of probable cause is rendered moot. Even ' " ' [i]f there is insufficient evidence to support the commitment, the defendant cannot be said to be prejudiced where sufficient evidence has been introduced at . . . trial' " ' to support the jury's finding as to the charge . . . ." (*Crittenden, supra,* at p. 137.) Since there was sufficient evidence presented at trial to support defendant's conviction, he cannot make a showing of prejudice. Accordingly, we reject defendant's claim that it was error for the trial court to deny his section 995 motion.

III. The Trial Court did not Abuse its Discretion in Admitting Lopez's Prior Consistent Statements

Defendant contends that the trial court erred by permitting the prosecutor to enhance the credibility of Lopez through the admission of prior consistent statements that she made to Inspector Antonio Flores on January 18 and January 31, 2007. He argues the statements were inadmissible hearsay because Lopez, not he, was the abuser and she therefore had a motivation to lie from the inception in order to manipulate the legal system against him.

We review a trial court's ruling on the " ' "admissibility of evidence for abuse of discretion." ' [Citation.]" (*Saxena v. Goffney* (2008) 159 Cal.App.4th 316, 332.) Abuse of discretion occurs only where there is a clear showing that the ruling exceeded the bounds of reason, given the circumstances. (*Ibid*.) Even if we determine the evidentiary ruling was in error, we will not reverse the judgment on the basis of such an evidentiary ruling unless the error resulted in a miscarriage of justice. (Cal. Const., art. VI, § 13; *Saxena, supra,* at p. 332.) That is, the party challenging the ruling must demonstrate that it is reasonably probable a more favorable result " ' "would have been reached absent the error. [Citations.]" [Citation.]' [Citations.]" (*Tudor Ranches, Inc. v. State Comp. Ins. Fund* (1998) 65 Cal.App.4th 1422, 1431–1432.)

Any out-of-court statement made by a testifying witness, offered to prove the truth of the matter asserted, is inadmissible hearsay unless the statement falls within one of the recognized statutory or judicial exceptions to the hearsay rule. (Evid. Code, § 1200, subd. (a); *People v. Thornton* (2007) 41 Cal.4th 391, 429.) Evidence Code sections 791 and 1236 are the exceptions at issue here. These sections provide that a prior consistent statement is admissible as an exception to the hearsay rule if it is (1) offered after an inconsistent statement used to attack the witness's credibility is admitted and the consistent statement was made before the inconsistent statement; or (2) when there is an express or implied charge that the witness's testimony was recently fabricated or influenced by bias or improper motive, and the statement was made before the fabrication, bias, or improper motive. (Evid. Code, §§ 791, 1236.)

On January 18, 2007, Lopez had a telephone conversation with Inspector Flores during which she reported that defendant had sexually assaulted her. A recording of the conversation was admitted and played to the jury. During their conversation, she told Flores that defendant had attacked her on January 5th, 9th, and 11th, but he did not actually have sex with her.

Flores interviewed Lopez again on January 31, 2007, and a recording of that conversation was also played for the jury. She related in more detail the incidents that she described in her earlier interview, and also brought up a fourth incident, on January 10th, that she had "forgot to mention." She also stated that defendant had threatened her and her family.

During the trial, defense counsel impeached Lopez's testimony with several prior inconsistent statements that she had made, both to the police and in the applications for a restraining order and a U-Visa.[9] She was also impeached on details she provided or omitted in her statements to Flores. For example, she told Flores she fought with defendant for an hour and a half on January 11, 2007, but she did not mention that he had tried to have sex with her the day before. At trial, she explained she was "simply

[9] A U-Visa relates to an application for a United States residency visa based in part on fear of being subject to harm if deported.

ashamed of revealing that." She acknowledged that she did not mention the January 10th incident until the second interview with Flores on January 31st. The trial court subsequently admitted into evidence transcripts of her conversations with Flores, citing Evidence Code sections 791 and 1236.

Here, defense counsel used Lopez's prior statements to imply that she lied when she testified defendant had abused and raped her. Defense counsel specifically impeached her using statements she had made to Flores. This strategy rendered it permissible for the prosecution to show that Lopez's testimony was consistent with the statements she made to Flores long before she testified at the preliminary hearing. We find no error.

We also agree with the People that the trial court acted properly when it declined to delete any portion of the interviews. The court reasoned that the jury needed to be presented with all of the material, including statements that were not prior consistent statements, in order to understand the context in which the relevant statements were made. Evidence Code section 356 provides: "Where part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party; when a letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence."

We also observe that we have already concluded defendant was properly convicted of count 10. The continuous conduct charged in count 10 did not commence until February 11, 2007. Lopez's statements to Flores were all made prior to that date, and are thus not germane to the specifics of the charge itself. Accordingly, the primary relevance of the statements goes to Lopez's general credibility as a witness. We have no reason to believe the jury did not carefully scrutinize her testimony before arriving at its decision to find defendant guilty on count 10. As defendant himself recognizes, even if the statements were erroneously admitted, he suffered minimal prejudice because the jury

clearly did not find her credible, given that it acquitted him of all the serious charges arising out of her statements to Flores.

Accordingly, even if Lopez's statements to Flores were erroneously admitted, we would find defendant was not prejudiced thereby. An error in admitting evidence under Evidence Code section 791 is harmless unless the defendant can demonstrate it is reasonably probable that he would have received a more favorable result had the prior consistent statements not been admitted. (*People v. Espinoza* (2002) 95 Cal.App.4th 1287, 1317; see also *People v. Watson* (1956) 46 Cal.2d 818, 836.) Defendant has not met his burden. Defendant has not demonstrated that it was reasonably probable that suppression of the consistent statements would have led to a different result.

DISPOSITION

Defendant's conviction on count 9 for violation of section 646.9, subdivision (a), and the sentence imposed thereon, is vacated. The trial court is directed to correct the abstract of judgment to so reflect and submit a corrected copy to the Department of Corrections and Rehabilitation. In all other respects, the judgment and sentence are affirmed.

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Dondero, J.

We concur:

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Marchiano, P. J.

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Margulies, J.